

2001

The Agenda-Setter for Complex Litigation

Richard L. Marcus

UC Hastings College of the Law, marcusr@uchastings.edu

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship



Part of the [Civil Procedure Commons](#)

Recommended Citation

Richard L. Marcus, *The Agenda-Setter for Complex Litigation*, 149 U. Pa. L. Rev. 1257 (2001).

Available at: http://repository.uchastings.edu/faculty_scholarship/435

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marcusc@uchastings.edu.



Faculty Publications

UC Hastings College of the Law Library

Author: Richard L. Marcus
Source: University of Pennsylvania Law Review
Citation: 149 U. Pa. L. Rev. 1257 (2001).
Title: *The Agenda–Setter for Complex Litigation*

Originally published in UNIVERSITY OF PENNSYLVANIA LAW REVIEW. This article is reprinted with permission from UNIVERSITY OF PENNSYLVANIA LAW REVIEW and University of Pennsylvania Law School.

THE AGENDA-SETTER FOR COMPLEX LITIGATION

RICHARD L. MARCUS[†]

I am honored to be allowed to contribute to this collection in recognition of Chief Judge Edward Becker, who has long been at the forefront in developing sensible ways for addressing a variety of issues that lie at the heart of handling modern complex litigation. As I reflected on Judge Becker's contributions to this area on which I have focused my professional career,¹ it struck me that the right theme for this essay would be the judge's role as an agenda-setter. For me, he first set that agenda nearly twenty years ago when I was working on my first civil procedure article,² and he has kept doing so ever since.

In political circles, it is widely appreciated that setting the agenda is a way to control the outcome of the game. Stalin, for instance, was able to achieve power in the early Soviet Union in significant measure because as General Secretary he controlled the agenda for the Politburo.³ But judges do not get to set their own agendas; it is one of the hallmarks of Anglo-American judges that they take what comes to them by the luck of the draw. Others—mainly the litigants—set the agenda for judges.⁴ So judges cannot control the game in the same way.

Despite these institutional constraints, Judge Becker has set the complex litigation agenda for decades. In part, it is because he set the agenda in other capacities than as a sitting judge. For example, he was a catalyst behind the creation of the Advisory Committee on Evi-

[†] Horace O. Coil ('57) Chair in Litigation, University of California, Hastings College of the Law.

¹ See RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (3d ed. 1998). Judge Becker's decisions have been displayed prominently in this casebook since the first edition appeared in 1985.

² See *infra* text accompanying note 62.

³ RICHARD PIPES, *RUSSIA UNDER THE BOLSHEVIK REGIME* 461 (1993) (describing Stalin's use of this authority to solidify his power and reporting that "because it was not, strictly speaking, a policy-making post, few realized the potential power that it gave the General Secretary").

⁴ The power of supreme courts to select the cases they hear is an exception to this general rule. Even supreme courts are limited to cases that litigants not only file, but pursue through the appellate courts.

dence Rules.⁵ In part, it is because the Judiciary has called on him to serve as an agenda-setter as a member of its Long Range Planning Committee. In part, it is because his incredible energy allows him to reach out to the practicing bar and academic communities along with carrying out his many judicial duties.⁶

Yet deciding cases has been Judge Becker's greatest contribution to the evolution of what he has called "our contemporary complex-litigation laden legal system."⁷ To some extent, this may be because the judge "benefited" from sitting on courts that had more than their share of such cases, and he had the "luck of the draw" to be assigned these cases, but the critical thing is not that he was assigned the cases, but what he did with them. Other contributions to this issue explore equally important aspects of the judge's work; for me, the sensible approach is to identify and illuminate briefly a few of the complex litigation subjects that have benefited from Judge Becker's careful and thorough attention to the issues raised by the cases he has handled.

I. SETTLEMENT CLASSES

Class actions have been one of the main ingredients of complex litigation since Judge Becker became a judge shortly after the 1966 amendments to Rule 23 expanded its application. In the 1980s, the battle largely focused on mass tort class actions, but by the 1990s it had shifted focus to the settlement class action. The Super Bowl on that subject was *Georgine v. Amchem Products, Inc.*, in which the judge introduced his opinion suitably: "Every decade presents a few great cases that force the judicial system to choose between forging a solution to a major social problem on the one hand and preserving its institutional values on the other. This is such a case."⁸ In that decision, Judge Becker set the agenda for the Supreme Court's later handling of the case, and therefore also for the rest of us as we grapple with the

⁵ Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 142 F.R.D. 519 (1992).

⁶ He has at least twice spoken to sections of the Association of American Law Schools during its annual meeting, trying to acquaint law professors with what is actually happening in the courts. During the past fifteen years, he has also authored about ten law review articles, which is more than many legal academics—who do not have active caseloads—have published.

⁷ *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 783 (3d Cir. 1995) [hereinafter *G.M. Trucks*].

⁸ *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

tensions presented by settlement class actions, even though it seems that the Court rejected his central conclusion about how Rule 23 should apply.

The background for this tension was the increasing realization of defendants in the early 1990s that, by settling a class action, they might work magical changes in their exposure. In place of indeterminate exposure to future litigation, they could substitute a fixed obligation set forth in the settlement. The main obstacle to making this approach work was whether the case could be certified as a class action, and so the question whether reaching a settlement could ease the path to class certification became critical.

From the outset, the framers of the 1966 amendments knew that class actions, like other cases, would be settled. But it is not clear that they thought about whether settlements could facilitate the use of the class action device. Creative lawyers and judges could see the potential synergy, however, and the settlement class action was born. Getting a case certified for litigation purposes was often difficult and hotly contested. Getting a case certified for discussion of possible settlement—or to give effect to a settlement already negotiated—avoided the contentious class certification difficulties.

The settlement class action presents significant risks as well, however, for the lawyer who represents the class can only settle, not litigate, and the other side might shop for a pliant lawyer to arrange an inadequate settlement. Rule 23(e) does require that the court must approve a settlement as fair before the class is bound, but there are serious doubts about the ability of a judge to evaluate a settlement that is supported vigorously by both sides. So the certification criteria could serve as an important check on the power of the court to implement seemingly benign arrangements endorsed by advocates for both sides."

There was thus early reluctance about allowing settlement classes.¹⁰ But practical considerations pointed the other way. As Judge Becker recognized in 1995 in *G.M. Trucks*, "increased use of settle-

¹⁰ I have elsewhere reflected on the "tort reform" temptations judges may face in this context. Richard Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L. REV. 858 (1995).

¹¹ The first edition of the *Manual for Complex Litigation*, for example, noted that some courts had begun tentatively certifying classes for purposes of settlement discussions, but recommended that "experience to date leads to the conclusion that tentative classes for the purposes of settlement . . . should *never* be formed." MANUAL FOR COMPLEX LITIGATION § 1.46, at 64 (1975) (emphasis added).

ment classes has proven extremely valuable for disposing of major and complex class actions in a number of substantive areas."¹¹ Nonetheless, he emphasized in that case that "the inquiry into the settlement's fairness cannot conceptually replace the inquiry into the propriety of class certification."¹² Accordingly, the court held that the fact of settlement could not ease the way to class certification.¹³

Of course, the *G.M. Trucks* decision did not forbid settlement classes altogether, but it came rather close. It is somewhat difficult to understand why plaintiffs would prefer settlement class certification if that could only be had in circumstances that would warrant certifying a litigation class. Why not insist on full certification, with the concomitant threat of full litigation should settlement not occur? So some lawyers might have thought that they could only use the settlement class on occasions when they would not want it.

In any event, *G.M. Trucks* set the scene for *Georgine*, perhaps the most aggressive and creative use of the settlement class action yet imagined. Appreciating how the judge set the agenda for the Supreme Court requires some description of the case. Under this elaborate settlement agreement, negotiated before the suit was even filed, everyone exposed to asbestos in the workplace who had not yet filed a suit (perhaps millions of people) would be subject to an administrative scheme providing scheduled benefits instead of being allowed to pursue claims in court. The schedule would accommodate those who were already sick, and those who were healthy but became sick years or decades later. By this method, the stupendous litigation expenditures that characterized asbestos litigation could be minimized, claimants would face less delay and a less chancy set of prospects for recovery, and the risk that those who sued for minor injuries might later find themselves precluded from asserting further claims if their conditions worsened would be eliminated. All in all, this settlement was a remarkable accomplishment, albeit more legislative than litigative in general feel.

But this huge class consisted of people with vastly different work histories and medical conditions making claims under the law of many different states. As a consequence, nobody suggested that the class could be certified for purposes of litigation. The key to its success

¹¹ *G.M. Trucks*, 55 F.3d at 778.

¹² *Id.* at 795.

¹³ *Id.* at 799 ("There is no language in the rule that can be read to authorize separate, liberalized, criteria for settlement classes. . . . [A]ctions certified as settlement classes must meet the same requirements under Rule 23 as litigation classes.").

would have to be relaxed standards for certification that emphasized the fact of the settlement to justify class action treatment where it would otherwise be unavailable.

Many objectors vigorously opposed the settlement, but the district court approved it. On appeal, Professor Laurence Tribe, representing the objectors, raised a host of constitutional arguments about whether a "suit" on behalf of people who were not sick yet satisfied case and controversy requirements or standing limitations. Judge Becker passed those issues by, preferring to decide the case on the basis that "[s]trict application"¹⁴ of Rule 23 was required by *G.M. Trucks*. Although proponents of the settlement urged that at least the manageability requirements of Rule 23(b)(3) could be overlooked in the settlement context, the court disagreed. The case could never be managed to permit a combined trial, the judge explained. As the judge had recognized in *G.M. Trucks*, "if any difference is warranted, pre-certification settlement may raise the adequacy of representation standard."¹⁵ In *Georgine*, he pointed out that there were serious intra-class conflicts resulting from the settlement's decisions about how to allocate settlement proceeds among people with different medical conditions, and an unavoidable conflict between those who were already sick and others who were not currently ill but might become sick in the future.¹⁶ To deal with these differences, the judge insisted that there be "structural protections to assure that differently situated plaintiffs negotiate for their own unique interests."¹⁷

Judge Becker's *Georgine* decision was agenda-setting in more than one way. Anticipating that this decision could have repercussions, the judge suggested that the Advisory Committee on Civil Rules consider whether to amend Rule 23 "to provide that settlement classes need not meet the requirements of litigation classes."¹⁸ Exactly such a proposal for amendment was formally circulated later that year.¹⁹ Thus, he might be said to have set part of the agenda for the rules committee.

¹⁴ *Georgine*, 83 F.3d at 625.

¹⁵ *G.M. Trucks*, 55 F.3d at 799 n.21.

¹⁶ *Georgine*, 83 F.3d at 630-31.

¹⁷ *Id.* at 631.

¹⁸ *Id.* at 634.

¹⁹ *Proposed Amendments to the Federal Rules of Civil Procedure*, 167 F.R.D. 559, 559 (1996) (proposing the addition of a new Rule 23(b)(4) allowing certification when "the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial").

Whether the judge expected the Supreme Court to grant certiorari, we cannot know, but we do know that after it took the case, many expected that at long last there would be clear directives about settlement classes. In one sense, the Court did provide a clear directive: "Settlement is relevant to class certification. The Third Circuit's opinion bears modification in that respect."²⁰ Specifically, and contrary to the holding below, the Court held that the fact of settlement should be considered in determining whether a class action would be manageable.

As the gentleness of the Supreme Court's disagreement with Judge Becker suggests, the Court nevertheless went to some pains to affirm his decision and follow its reasoning. The reality is that, as to both structure and content, Justice Ginsburg substantially followed Judge Becker. Thus, although Professor Tribe (still representing the objectors) again relied heavily on justiciability arguments, Justice Ginsburg concluded that class certification was "logically antecedent" to those questions, and explained that "[w]e therefore follow the path taken by the Court of Appeals."²¹

On Rule 23 itself, despite disagreeing with the judge on whether settlement should be taken into account, the Court closely adhered to his analysis, sometimes borrowing even his terminology. Thus, it emphasized that approval of the fairness of a class action settlement is no substitute for establishing that class certification is warranted,²² explaining that "we conclude that the Third Circuit's appraisal is essentially correct."²³ As Judge Becker had recognized in *G.M. Trucks*, Justice Ginsburg pointed out that the fact of settlement cuts two ways and can make review more exacting on some grounds: "For reasons the Third Circuit aired, proposed settlement classes sometimes warrant more, not less, caution on the question of certification."²⁴ Like Judge Becker, the Court focused on the differences in position between class members who are currently sick and those who manifest no symptoms.²⁵ It noted that "essential allocation decisions" were embedded in the settlement agreement's matrix, and borrowed a phrase from

²⁰ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997). Justice Breyer said that this was the Court's "basic holding" in his separate opinion. *Id.* at 629 (Breyer, J., concurring in part and dissenting in part).

²¹ *Id.* at 612.

²² *Id.* at 620-22; see *supra* text accompanying note 12.

²³ *Amchem*, 521 U.S. at 622.

²⁴ *Id.* at 620 n.16 (citation omitted); see *supra* text accompanying note 15.

²⁵ *Amchem*, 521 U.S. at 624; see *supra* text accompanying note 16.

Judge Becker by calling for “structural assurance of fair and adequate representation” through subclassing.²⁶ Judge Becker’s opinion is invoked so frequently that it is striking.²⁷ Justice Breyer even rebuked the majority for relying so heavily on Judge Becker.²⁸

So even though what might seem Judge Becker’s central proposition—that all the certification criteria apply with full force despite a settlement—did not carry the day, the basic agenda he set for approving a settlement class action seems very much in place.

II. EXPERT SCIENTIFIC OPINION

If settlement class actions were the blockbuster procedural issue of complex litigation during the 1990s, the admissibility of “scientific” testimony was the most significant evidentiary issue for complex cases in the last 20 years. Here the Supreme Court’s blockbuster was its

²⁶ *Anchem*, 521 U.S. at 627; see *supra* text accompanying note 17.

²⁷ A partial list shows the pervasiveness of reliance on Judge Becker’s opinion:

“As the Third Circuit observed in the instant case: ‘Each plaintiff [in an action involving claims for personal injury and death] has a significant interest in individually controlling the prosecution of [his case]’; each ‘ha[s] a substantial stake in making individual decisions on whether and when to settle.’” *Anchem Prods., Inc.*, 521 U.S. at 616 (quoting *Georgine*, 83 F.3d at 633).

“The Court of Appeals’ opinion amply demonstrates why—with or without a settlement on the table—the sprawling class the District Court certified does not satisfy Rule 23’s requirements.” *Id.* at 622.

“As the Third Circuit’s opinion makes plain, the certification in this case does not follow the counsel of caution.” *Id.* at 625.

“Like the Third Circuit, we decline to address adequacy-of-counsel issues discretely in light of our conclusions that common questions of law or fact do not predominate and that the named plaintiffs cannot adequately represent the interests of this enormous class.” *Id.* at 626 n.20.

“The Third Circuit found no assurance here . . . that the named plaintiffs operated under a proper understanding of their representational responsibilities. That assessment, we conclude, is on the mark.” *Id.* at 627-28 (citation omitted).

“In accord with the Third Circuit, . . . we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.” *Id.* at 628 (citation omitted).

Justice Breyer concluded that Judge Becker’s analysis was tainted by his insistence that the certification requirements apply with full force even though there has been a settlement:

I do not believe that we can rely upon the Court of Appeals’ review of the District Court record, for that review, and its ultimate conclusions, are infected by a legal error. There is no evidence that the Court of Appeals at any point considered the settlement as something that would help the class meet Rule 23.

Id. at 630 (Breyer, J., concurring in part and dissenting in part) (citation omitted).

1993 decision in *Daubert*.²⁹ Although these problems are hardly limited to complex litigation, they can assume special importance in those cases, particularly "toxic torts." There have even been entire trials in complex cases focusing solely on scientific issues of causation.³⁰

Although others will explore Judge Becker's influence on the law of evidence in this issue, I could not overlook the judge's role as an agenda-setter on these crucial topics. In a 1985 criminal case,³¹ Judge Becker carefully examined the longstanding *Frye* rule,³² which relied on general acceptance of a principle by scientists. *Frye* had been roundly attacked by commentators but still prevailed in most courts. Despite that widespread judicial support for *Frye*, Judge Becker concluded that it should no longer be the controlling factor, a clear precursor to *Daubert*'s abandonment of *Frye*. In place of *Frye*'s exclusive reliance on scientific acceptance, Judge Becker looked to Federal Rule of Evidence 702 and developed a sequence of analysis to assist courts for the post-*Frye* era. *Daubert*, of course, has ushered in that era, and Justice Blackmun there invoked Judge Becker's 1985 insistence that the theory be tied to the facts of the case, explaining that "[t]he consideration has been aptly described by Judge Becker as one of 'fit.'"³³ As Professor Saltzburg has put it, *Daubert* "made Judge Becker's analysis the law of the land."³⁴

So again in a highly important area we find Judge Becker ahead of the pack and leading the way, in part for the Supreme Court itself. It is thus no surprise that we find yet another of his pathbreaking decisions—the 1994 ruling regarding expert causation testimony in the *Paoli Railroad Yard*³⁵ toxins litigation—repeatedly cited in the Committee Note accompanying the 2000 amendments to Federal Rule of Evidence 702.³⁶

²⁹ *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993).

³⁰ See *In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988) (reviewing a trial of 800 consolidated cases limited to the issue of whether the drug could cause birth defects).

³¹ *United States v. Downing*, 783 F.2d 1224 (3d Cir. 1985).

³² *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

³³ 509 U.S. at 591.

³⁴ *Presentation of Portrait: Hon. Edward R. Becker*, 184 F.3d LV, LXII (1999) (reporting in transcript format the remarks of Prof. Stephen A. Saltzburg).

³⁵ *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994).

³⁶ *Amendments to Federal Rules of Civil Procedure, Federal Rules of Evidence, Federal Rules of Criminal Procedure and Federal Rules of Bankruptcy Procedure*, 192 F.R.D. 340, 420, 421, 423 (2000) (citing *Paoli R.R. Yard PCB Litig.*, 35 F.3d at 717).

III. SUMMARY JUDGMENT

When Judge Becker ascended the bench, summary judgment was the last thing many would think significant for complex litigation. To the contrary, the widespread perception among judges was that to grant summary judgment was to invite reversal on appeal in any kind of case. Doing so in a complex case seemed an engraved invitation to being reversed.

That attitude started to change with the Supreme Court's 1986 trilogy of summary judgment decisions, which evinced sympathy for the view that this device should be an important method of deciding cases. As a result, every law student now learns about the trilogy's transformation of summary judgment in the first year of law school. The trilogy's complex litigation case was *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*³⁷ *Matsushita* was Judge Becker's case when he was on the district court.³⁸

By any standard, *Matsushita* (known at the time as the Japanese Antitrust Litigation) was a complex case. It involved claims by two American manufacturers of electronic products that a bevy of Japanese manufacturers, aided and abetted by the Government of Japan, had conspired to drive the plaintiffs out of business by marketing televisions and other products in this country at prices so low as to be predatory. The conspiracy was said to have lasted decades and involved sales of a large variety of products. The case was so complicated that the defendants asked Judge Becker to strike plaintiffs' jury demand on the ground that a jury could not understand the issues.³⁹ When he denied the motion, they managed to persuade a panel of the Court of Appeals that Fifth Amendment Due Process concerns might sometimes justify denying the Seventh Amendment right to a jury trial.⁴⁰

³⁷ 475 U.S. 574 (1986).

³⁸ *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125 (E.D. Pa. 1980), *aff'd in part, rev'd in part sub nom. In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

³⁹ *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889 (E.D. Pa. 1979) (rejecting the argument that a jury trial could be denied on grounds of the complexity of the case), *vacated by In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980).

⁴⁰ *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980) (re-manding the case for a decision on whether the jury demand should be stricken); *cf. In re U.S. Fin. Sec. Litig.*, 609 F.3d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980) (rejecting attempts to limit the right to a jury trial in complex cases). Judge Becker

Perhaps it was the prospect of trying this case before a jury that prompted defendants to file a summary judgment motion in the face of prevalent misgivings about summary judgment. Perhaps defendants perceived as well that they had a far-seeing judge who would treat the motion seriously. Plaintiffs responded to the summary judgment motion by arguing that summary judgment "has almost never been granted in antitrust cases where 'state of mind' is in issue."⁴¹ Undeterred, Judge Becker rejected their argument that the burden lay on defendants to make a compelling case for summary judgment even though burden of proof would ultimately lie on plaintiffs, thus anticipating the Supreme Court's 1986 decision in *Celotex*.⁴²

But the case was not in a suitable posture for resolving the summary judgment motion, so the judge directed the parties to submit final pretrial statements, with preclusive effect, so that anything left out could not be used at the trial. Plaintiffs submitted a 17,000 page statement, referencing some 250,000 documents, and the parties then embarked on what the judge called a "veritable odyssey"⁴³ when defendants disputed the admissibility of much of this material. That evidentiary inquiry led to five weeks of hearings, and the judge eventually ruled large portions of plaintiffs' evidence inadmissible. With the evidence thus winnowed, Judge Becker granted summary judgment to defendants.

Plaintiffs appealed. The Court of Appeals agreed with Judge Becker that defendants' showing was adequate to require plaintiffs to make a pretrial showing they had sufficient evidence to support their case.⁴⁴ It also approved his insistence that the parties submit pretrial preclusive statements of their evidence.⁴⁵ But it reversed anyway, find-

never resolved that question, finding that summary judgment provided a basis for deciding the case.

⁴¹ *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1139 (E.D. Pa. 1981), *aff'd in part, rev'd in part sub nom. In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁴² *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (rejecting the argument that the initial showing required of the summary judgment moving party is onerous when the opposing party bears the burden of proof). For Judge Becker's discussion in *Matsushita*, see 513 F. Supp. at 1143.

⁴³ *Zenith Radio Corp.*, 513 F. Supp. at 1117.

⁴⁴ *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom. Matsushita Elec. Indus. Co.*, 475 U.S. at 574.

⁴⁵ "We explicitly approve, for protracted cases, the trial court's determination . . . which required preparation of a FPS with preclusive effect, permitted in limine rulings on evidence issues, and created a record on which summary judgment issues might

ing that several of the judge's rulings excluding evidence were wrong, and that considering this evidence undermined the summary judgment ruling because, thus augmented, the evidence sufficed to permit an inference defendants had conspired to engage in predatory pricing for some twenty years.

Without reaching the evidentiary issues, the Supreme Court held that the Third Circuit had erred on what plaintiffs had to prove to recover for an antitrust violation. In large measure, the decision reflected evolving attitudes toward antitrust law, particularly whether predatory pricing would often be a viable claim. Justice White dissented, accusing the majority of an "academic discussion about predation," and asserting that "the question is not whether the Court finds respondents' experts persuasive, or prefers the District Court analysis."⁴⁶ The Court remanded for a determination whether, given its ground rules on the showing required to support an inference of predatory pricing, the record contained any other evidence sufficient to support plaintiffs' claims. The Third Circuit found that the law of the case precluded such an argument in light of the Court's reasoning, and the summary judgment stood.⁴⁷ The judges of the Eastern District of Pennsylvania must have heaved a collective sigh of relief, for Judge Becker had by then been elevated to the Court of Appeals, and somebody else would have had to handle this litigation behemoth had it continued.

The point for our purposes is not so much the intricacy of this aspect of antitrust law, but that the case served as a harbinger of enhanced reliance on summary judgment, even in complex cases. Judge Becker had paved the way (as approved by the Supreme Court and the Court of Appeals) for more vigorous pretrial management of complex cases to put them in a posture suitable for summary judgment. Particularly when coupled with the *Daubert* gatekeeper function with regard to scientific evidence, that could produce a new litigation agenda for those cases.

IV. LITIGATION CONFIDENTIALITY

For nearly two decades, there has been a growing debate about litigation confidentiality.⁴⁸ Particularly in product liability cases, there

then be addressed." *Id.* at 259.

⁴⁶ 475 U.S. at 606 (White, J., dissenting).

⁴⁷ *In re Japanese Elec. Prods. Antitrust Litig.*, 807 F.2d 44 (3d Cir. 1986).

⁴⁸ See generally Richard L. Marcus, *The Litigation Confidentiality Controversy*, 1991 U.

have been repeated calls to increase access to materials turned over through discovery. It seems as though somebody accuses the courts of covering up damaging information unearthed through discovery whenever there is widespread concern about the safety of some product. Although it has hardly been restricted to complex litigation, this debate has assumed unusual importance in that sort of case because of the large volume of discovery complex litigation often involves, and the recurrent possibility that some of it involves highly sensitive materials.

Twenty years ago, this debate was just beginning. The District of Columbia Circuit had announced broadly that courts could not restrict dissemination of discovery materials unless the onerous requisites for a prior restraint were satisfied because court-imposed confidentiality restricted the speech of the party who obtained the materials through discovery.⁴⁹ As in so many other important areas, Judge Becker was thrust into this maelstrom at an early point, and as in so many areas, he produced a thoughtful analysis that provided a foundation for later work.

This problem also emerged in the Japanese Antitrust Litigation. Even before Judge Becker was assigned the case, the parties had stipulated to a protective order that restricted dissemination of materials produced through discovery if they were deemed confidential. The order permitted any party to object to a confidentiality designation with regard to specific documents, but none did so during the litigation; one plaintiff even produced over 100,000 pages of material on paper preprinted with the confidentiality designation.⁵⁰ After summary judgment was entered in favor of defendants, however, plaintiffs pressed their longstanding motion to remove the limitations on their use of the materials subject to the order, perhaps to provide them to Congress or others concerned about allegedly unfair practices by Japanese companies.⁵¹ Plaintiffs claimed then that most of the documents stamped confidential had not really been, and that in any event they were no longer because the passage of time had made the infor-

ILL. L. REV. 457.

⁴⁹ *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979).

⁵⁰ *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 875 n.11 (E.D. Pa. 1981).

⁵¹ Whether plaintiffs actually intended such use remained somewhat uncertain. See *id.* at 886 n.31 (describing Judge Becker's questioning of plaintiffs' counsel about whether the documents would be provided to members of Congress or newspapers, and counsel's statement that there was no "present intention to make such use of defendants' documents").

mation in them "stale."

As a starting point, the judge emphasized the importance of protecting confidentiality to facilitate discovery in complex litigation:

The propriety and desirability of protective orders securing the confidentiality of the documents containing sensitive commercial information that are the subject of discovery in complex case is too well established to belabor here. We are unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order similar to [the one in this case] has not been agreed to by the parties and approved by the court. Protective orders have been used so frequently that a degree of standardization is appearing.⁵²

Despite these considerations, the judge had to address three categories of arguments. First, he held that the stipulated protective order was warranted under the Civil Rules even though the initial decision what to designate was left up to the parties themselves.⁵³ Given the breadth of the charges, it was apparent from the outset "that large quantities of sensitive commercial data would be sought in discovery. . . . Thus, the propriety of some form of umbrella protective order was never seriously in doubt."⁵⁴ Wholesale declassification would undermine this entire structure, and the judge forcefully (albeit without a strong basis in precedent⁵⁵) rejected the idea that an across-the-board attack could be substituted for more focused objections. He was also very careful to emphasize the need to preserve flexibility in framing confidentiality orders.

The plaintiffs' second challenge addressed a question that has come up increasingly frequently—whether the public right of access to "judicial records" should invalidate restrictions on access to discovery under a series of Supreme Court decisions that dealt with access to

⁵² *Id.* at 889; *see also id.* at 879 n.18 ("The smooth exchange of discovery material is enormously important in the complex case. Wholesale designations without repeated objection facilitate the discovery process."); *id.* at 905 ("[O]rderly management of complex litigation is in the public interest. Enormous cases like this one cannot be fairly and expeditiously adjudicated unless parties are assured that their legitimate interests will be protected. Often that assurance cannot be given unless parties are permitted to rely on guarantees of confidentiality."); *id.* at 910 n.90 ("[I]n complex cases like this one, the requisites of case management include orderly discovery . . ."); *id.* at 912 ("[T]he courts must be able to manage successfully large and complex cases.").

⁵³ As the judge noted some years later in a different case, the designation of a document as confidential without good grounds is subject to sanctions under Rule 26(g). *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122 n.17 (3d Cir. 1986).

⁵⁴ *Zenith Radio Corp.*, 529 F. Supp. at 892.

⁵⁵ *Id.* at 895 ("Inasmuch as there is a paucity of authority on this point, we rest our decision essentially on our own analysis." (footnote omitted)).

criminal trials. This right ensures that the public can observe and evaluate the performance of its judges. Correctly recognizing that this right applies to civil cases as well as criminal ones,⁵⁶ the judge nevertheless rejected the application of the concept to "materials that are involved in litigation but never come into the possession of the court."⁵⁷ But as we have seen, an enormous amount of material was called to the judge's attention in connection with the summary judgment proceedings,⁵⁸ so it became necessary to weigh the interest of public access to these materials against the potential disruption of complex litigation that could result from guaranteeing that access. On this point, the judge carefully ensured a broad opportunity for access to the materials on which he based his summary judgment ruling, including those he held inadmissible.⁵⁹

Finally, there was the First Amendment approach adopted by the District of Columbia Circuit shortly before Judge Becker was presented with these problems. The judge started from proposition that, under Rule 26(c), "litigants' First Amendment interests in the dissemination of discovery materials are adequately protected by the balancing of interests for and against nondisclosure."⁶⁰ Given the substantial interest in facilitating efficient discovery in complex cases, the judge rejected the District of Columbia Circuit's view and held that the parties' modest First Amendment interests in disclosing information obtained through discovery were outweighed by systemic concerns.⁶¹

These subjects struck me as sufficiently important at the time that I wrote my first major civil procedure article about them.⁶² I used Judge Becker's opinion as the focal point of the article, and on re-reading it nearly twenty years later find it just as impressive as I did the first time. In 1984, the Supreme Court adopted the judge's approach to the First Amendment issues, holding that a Rule 26(c) protective order supported by good cause is valid over a First Amendment objection.⁶³ In 1990, the Federal Courts Study Committee urged that this

⁵⁶ *Id.* at 896.

⁵⁷ *Id.* at 897.

⁵⁸ See *supra* text accompanying note 43.

⁵⁹ *Zenith Radio Corp.*, 529 F. Supp. at 898-99.

⁶⁰ *Id.* at 908. The judge also suggested that such orders should be "drafted in the least restrictive manner possible." *Id.*

⁶¹ *Id.* at 911-12.

⁶² Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983).

⁶³ *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984) ("We therefore hold that

flexibility be retained.⁶⁴ On the question of access to "court records," Judge Becker's opinion is as good a statement as exists of the correct analysis, which courts unfortunately still mishandle on the notion that discovered materials are part of the "court record."⁶⁵ The recent amendment of Rule 5(d) to forbid filing of discovery materials until they are "used in the proceeding" may reduce the frequency of such mistakes. More generally, although the question whether courts should be receptive to stipulated orders continues,⁶⁶ the judge's analysis represents a basic starting point for anyone confronting the litigation confidentiality problems in complex litigation. Again, Judge Becker broke the path, and most have followed.

V. COMPUTER-BASED DISCOVERY

Although litigation confidentiality has been a discovery issue for two decades, computer-based discovery is a hot new topic. Since 1997, lawyers have regularly told the Advisory Committee on Civil Rules⁶⁷ that these new problems called for new rules. Continuing education programs and articles repeatedly cite the challenges of gathering and producing materials stored on computers. Headlines trumpet the importance of evidence from e-mails. This certainly seems to be the topic of tomorrow, and it is one of particular importance in complex litigation. Already the Advisory Committee on Civil Rules has held two conferences on the subject,⁶⁸ and serious concerns have been voiced about whether the rules adequately deal with the cost and potential intrusiveness of this type of discovery.

On this topic also, Judge Becker led the way. That is not to say

where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment"). Judge Becker's opinion is the only district court decision cited by the Court in this case. *See id.* at 36 n.23.

⁶⁴ REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 92 (1990).

⁶⁵ For an illustration of misuse of the concept, consider *San Jose Mercury News v. U.S. District Court*, 187 F.3d 1096 (9th Cir. 1999), which holds that a stipulated protective order is ineffective to prevent release to a newspaper of discovery materials because discovery is "presumptively public" and its fruits therefore "public records."

⁶⁶ *See, e.g.*, *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996) (objecting that "the parties were allowed to adjudicate their own case based upon their own self interest").

⁶⁷ I have since 1996 served as Special Reporter to the Advisory Committee in connection with its study of the discovery rules.

⁶⁸ The first was in San Francisco on March 27, 2000, and the second was in Brooklyn on October 27, 2000.

that he saw it all coming, but he did see more than anyone else. Again the stimulus was the Japanese Antitrust Litigation, in which defendants sent an interrogatory requesting detailed sales data on television by one plaintiff. The plaintiff answered with 1000 pages of numerical data, and defendants asked the judge to order the plaintiff to provide a computer-readable version of the interrogatory answers. The plaintiff objected that this would not be authorized because it required the production of something that did not exist—a disk containing the responsive material in computer-readable form. The judge rejected this objection, noting that it “is a mechanical, not a qualitative, difference.”⁶⁹ He concluded with general remarks that are justly invoked often today:

It may well be that Judge Charles E. Clark and the framers of the Federal Rules of Civil Procedure could not foresee the computer age. However, we know we now live in an era when much of the data which our society desires to retain is stored in computer disks. This process will escalate in years to come; we suspect that by the year 2000 virtually all data will be stored in some form of computer memory. To interpret the Federal Rules . . . in a manner which would preclude the production of material such as is requested here, would eventually defeat their purpose.⁷⁰

It seems that the judge's prediction about the millennium has largely come true.⁷¹ It is clear that his decision is still the starting point in analyzing these issues.⁷² For the future, the question is whether the ever-expanding volume of computerized material, and the proprietary and other technological issues it presents, do call for revision of the rules.⁷³ Although he surely could not have foreseen the advent of e-mail communication (with attendant discovery issues), or the importance of “embedded” material that can be provided with word processed items, the judge did provide the foundation on which the rest of us must now build.

⁶⁹ Nat'l Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257, 1260 (E.D. Pa. 1980).

⁷⁰ *Id.* at 1262.

⁷¹ See *Byte Counters*, ECONOMIST, Oct. 21, 2000, at 96 (reporting that of all estimated data in the world, some eighty percent exist in magnetic form).

⁷² See 8A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2218, at 451-53 (2d ed. 1994) (relying on Judge Becker's decision as the basis for analyzing current problems of discovery of computerized information).

⁷³ For discussion of the current situation, see Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, LAW & CONTEMP. PROBS., forthcoming 2001.

VI. REFLECTIONS ON AGENDA-SETTING

This effort to portray Judge Becker's pervasive importance to the issues that matter in complex litigation brought home to me the astonishing breadth, depth, and influence of his work. And even limiting myself to complex litigation, I had to disregard a number of other cases that are also important.⁷⁴ As Judge Scirica has observed more generally, "no member of this Court has had a more profound influence on our jurisprudence."⁷⁵ How did he do it all?

The basic answer, it seems to me, is not just that he is smarter than the rest of us, but also that he is uniquely honest, energetic, and persistent in search of sensible solutions. Above all, he is comprehensive. Justice Ginsburg described the Third Circuit decision in *Georgine*⁷⁶ as "a long, heavily detailed opinion by Judge Becker."⁷⁷ She was right, except for the "by Judge Becker" part of it. The opinion is both long and heavily detailed, but not by comparison to many of the judge's other opinions. Indeed, by that standard it might even be said to be one of the shorter efforts; his opinion on related issues a year earlier in *G.M. Trucks*⁷⁸ was considerably longer. In reversing the Third Circuit's reversal of the judge's entry of summary judgment in the Japanese Antitrust Litigation, the Supreme Court noted in awe that the decision was 220 pages long, and overall the published decisions in this litigation "would fill an entire volume of the Federal Supplement."⁷⁹

Even academics admit that longer is not better; judges (who adore page limits) surely know it.⁸⁰ Judge Becker does not write long opinions because he wants to; he does so because he *needs* to. The most

⁷⁴ For examples from 2000, see *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000) (holding that the arbitration clause in loan agreements is enforceable even though borrowers wanted to bring a class action under the Truth in Lending Act); *Gunther v. Ridgewood Energy Corp.*, 223 F.3d 190 (3d Cir. 2000) (articulating criteria for attorney fees awards in a class action and supporting the use of guidelines and bidding in such situations). Additional examples from prior years are too numerous to mention.

⁷⁵ *Presentation of Portrait: Hon. Edward R. Becker*, 184 F.3d LV, LIX (1999) (reporting in transcript format the remarks of Hon. Anthony Scirica).

⁷⁶ See *supra* notes 14-17 and accompanying text.

⁷⁷ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 608 (1997).

⁷⁸ See *supra* text accompanying notes 11-13.

⁷⁹ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 577 (1986).

⁸⁰ In *G.M. Trucks*, Judge Gibson noted that Judge Becker's opinion was "truly masterful" and "most thorough and scholarly," 55 F.3d 768, 823 (3d Cir. 1995), but did not join it because he found it unnecessary to reach several issues addressed by Judge Becker.

striking thing to me in rereading some of them is that there is no wasted discussion and there are no missed points. So far as I can tell, there is no missing authority either. It must be a bit terrifying to be a law clerk for Judge Becker, and somewhat daunting to be a member of a panel with him, because his standard is so high. It is exhilarating to be an academic reading one of his opinions because, whether or not you agree, you must admit that all the points are raised and carefully evaluated. What's more, Becker opinions are well written and bristle with pithy phrases. Who can resist a judge who not only describes a class action as "humongous,"⁸¹ but prompts the Supreme Court to use the same word?⁸²

That is how a judge becomes an agenda-setter. As I have tried to show here, across a spectrum of crucial issues in complex litigation, Judge Becker has led the way and shaped the law with his implacable insistence on getting it right. Unfortunately, in this area "right" is often an elusive concept, and even Judge Becker has not answered all the questions. But my brief review shows how often he has been the leader, even for the Supreme Court. On the central issue of modern class actions—use of settlement classes—the Supreme Court followed his basic analysis even while disagreeing with him on one important point.⁸³ Repeatedly, the Court has adopted his exact terminology for important propositions.⁸⁴ Indeed, dissenting justices have chastised the majority for adopting the judge's analysis.⁸⁵ For the federal rule-makers, the judge has acted as a catalyst for specific proposals⁸⁶ and even for the creation of a new Advisory Committee.⁸⁷ For those concerned with discovery reform, he illuminated the crucial areas of litigation confidentiality⁸⁸ and discovery of computerized information.⁸⁹

⁸¹ *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom. Amchem*, 521 U.S. at 591.

⁸² *Amchem*, 521 U.S. at 610 ("[T]he number of uncommon issues in this humongous class action,' the Third Circuit concluded, barred a determination, under existing tort law, that common questions predominated.").

⁸³ See *supra* Part I.

⁸⁴ See *supra* text accompanying notes 26, 33 (discussing "structural assurances" of adequate representation in class actions and discussing the concept of "fit" in regard to expert scientific evidence, respectively).

⁸⁵ See *supra* text accompanying note 28 (discussing settlement class analysis); see also *supra* note 46 (discussing summary judgment analysis).

⁸⁶ See *supra* note 19 and accompanying text (discussing a proposed amendment to Rule 23 to address settlement classes).

⁸⁷ See *supra* note 5 and accompanying text (describing the creation of the Advisory Committee on Evidence Rules).

⁸⁸ See *supra* Part IV.

For all of us who labor in the vineyards of complex litigation, the challenge is to build on his foundation as we seek the answers to the questions he has illuminated.

Of course, the Supreme Court sets its own agenda, and the various committees that fashion rules for complex litigation are not beholden to a court of appeals judge in setting their own agendas. Yet, as I hope I have shown above, Judge Becker has repeatedly led the way on the central issues of complex litigation. In a sense, the agenda was *there*, and the judge simply showed the rest of us how to handle it. For that, we should all be grateful to him. I certainly am.

⁸⁹ See *supra* Part V.

* * * * *